No. 94132-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONNIE POTTER,
trustee of the Amended and Restated Fredrick O. Paulsell, Jr. Living Trust dated December 22, 2002,

Petitioner,

v.

JOSEPH MICHAEL GAFFNEY and JANE DOE GAFFNEY, his wife, and DORSEY WHITNEY, LLP, a Minnesota Limited Liability Partnership,

Respondents.

MEMORANDUM OF AMICI CURIAE BRIAN J. WAID AND ROBERT J. WAYNE IN SUPPORT OF PETITION FOR REVIEW

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IDENTITY AND INTEREST OF AMICI

Amici Curiae Brian J. Waid and Robert J. Wayne are members of the Washington State Bar Association and experienced practitioners in the area of legal malpractice. Amici often represent clients harmed by negligent representation, and they have seen the subject of this appeal—the so-called "ABC Rule"—applied to limit those clients from recovering damages that flow proximately from attorney negligence. Their experience with this issue, and their interest in seeing their clients made whole, gives them an interest in this case and a valuable perspective to offer. *See generally* Mot. of Brian J. Waid and Robert J. Wayne for Leave to File Mem. of Amici Curiae.

STATEMENT OF THE CASE AND ISSUES

Plaintiff claims that Defendant Joseph Gaffney breached his fiduciary duties by representing two clients with conflicting interests. She also asserts that Gaffney committed actionable negligence when he concluded that one client owed $3 million to a trust benefitting both clients. Rather than immediately pursue this $3 million claim against Gaffney, the client hired counsel at the cost of a fraction of that $3 million amount in order to establish that she did not owe the money to the trust. She succeeded.

The policy requiring the mitigation of damages holds that this is exactly what an injured party should do if doing so is possible and reasonable. The ABC Rule, as applied here, punishes the injured client by forbidding any recovery precisely because she mitigated. The principle issue that Amici address in this Memorandum is whether the ABC Rule should continue to be applied in this way.

In addition, the Court of Appeals—but not this Court—has created a peculiar causation standard when applying the ABC Rule. The second issue that Amici address is how this causation standard conflicts with Washington's normal rules of proximate cause—and indeed, with this Court's own precedents.

ARGUMENT

I. The ABC Rule is inconsistent with the duty to mitigate damages—as well as that duty's corollary, which is that expenses incurred in mitigation are recoverable.

"It has long been the law in this state and elsewhere that an injured party must, whenever possible, attempt to mitigate his damages." *Kubista v. Romaine*, 14 Wn. App. 58, 63, 538 P.2d 812 (1975) (citing cases), *aff'd*, 87 Wn.2d 62, 549 P.2d 491 (1976). Injured parties thus cannot recover damages they could have prevented by reasonable effort and expense. *Id.* This rule applies fully to legal malpractice. *See, e.g.*, *Bullard v. Bailey*, 91 Wn. App. 750, 759–60, 959 P.2d 1122 (1998).

A strong public policy lies behind the duty to mitigate. Where an injured could easily have avoided the full extent of harm, "recovery for the harm is denied because it is in part the result of the injured person's lack of care, and public policy requires that persons should be discouraged from wasting their resources, both physical or economic." *Restatement (Second) of Torts* § 918 cmt. a (1979).

Because public policy encourages injured persons to mitigate their damages, there is an "obvious corollary" to the duty to mitigate. *Kubista*, 14 Wn. App. at 64. The corollary is that "an injured party is generally entitled to all legitimate and reasonable expenses necessarily incurred . . . in an honest and good faith effort to reduce the damages" flowing from a wrong. *Id.* (citing *Snowflake Laundry Co. v. MacDowell*, 52 Wn.2d 662, 674, 328 P.2d 684 (1958); 25 C.J.S. *Damages* § 49 (1966)). This rule ensures that injured parties are not left worse off if they attempt to mitigate their damages.

The ABC Rule, however, is inconsistent with these fundamental mitigation principles. If, as here, a client is forced to litigate against a third party in order to correct an attorney's negligent advice, the ABC Rule will often prevent the client from recovering the expenses of that litigation from the attorney whose negligence made the litigation necessary. *See* Pet. 13–14. Indeed, under the ABC Rule, whether the client is able to recover

those mitigation expenses does not depend on the usual test—that is, on whether the expenses were "legitimate and reasonable." *Kubista*, 14 Wn. App. at 64. Instead, whether the client can recover depends on a completely unrelated matter—on whether the third party in the earlier litigation has some kind of factual connection to the relationship between the attorney and the injured client. *See* Pet. 1, 13. This test has nothing to do with whether the client's litigation expenses were reasonably incurred to mitigate damages.

But the ABC Rule does not merely bar many a client from recovering mitigation expenses; it also has the effect of discouraging injured clients from trying to mitigate their damages at all. If an attorney's negligence has injured a client, and the client may be able to lessen that injury through litigation with a third party who has some factual connection to that negligence, the ABC Rule will bar the client from recovering the expenses of that litigation. In that event, the client may well opt simply to sue the negligent attorney straightaway without any attempt at mitigation.

At best, the client is left with an unenviable dilemma. If she tries to mitigate her damages through litigation, she may not be able to recover

those mitigation expenses from her negligent attorney.[1] On the other hand, if she knows that her attempts at mitigation will not be rewarded, and thus sues the negligent attorney immediately, she will be subject to a mitigation-of-damages defense that may bar much or all of her damages. Normal mitigation principles—the duty to mitigate, combined with its corollary that the expenses of mitigation are recoverable—are designed to forestall this dilemma.

The ABC Rule, at least in its current form, cannot coexist with normal mitigation rules. And because, as we have seen, those mitigation rules promote important public policies, reconsideration of the ABC Rule raises an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). The Court should therefore grant the Petition for Review in this case to modify the ABC Rule as it applies to legal malpractice.

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[1] The duty to mitigate damages does not *always* require an injured client to litigate against a third party. *See Flint v. Hart*, 82 Wn. App. 209, 220, 917 P.2d 590 (1996) (noting that settling before final judgment will sometimes satisfy the duty to mitigate); *see also Bullard*, 91 Wn. App. at 760 (duty to mitigate did not require client to try to reinstate a suit). However, litigation is often *a* reasonable, and sometimes the *only* reasonable, mitigation option. Also, if the ABC Rule applies, then even when an injured client does not litigate all the way to the end, but instead reasonably settles her claim before final judgment, the ABC Rule, as currently construed by lower courts, may prevent that client from recovering the expenses of that litigation from her negligent attorney.

II. The ABC Rule—as applied by the Court of Appeals, although not by this Court—conflicts with normal rules of proximate cause.

As Petitioner has previously argued, *see* Reply Br. 16–18, the Court of Appeals has construed the ABC Rule to include a peculiar causation standard. As construed by the Court of Appeals, the ABC Rule requires an injured plaintiff to show that the defendant was the sole cause—not merely a proximate cause—of the earlier litigation for which the plaintiff seeks compensation. *See Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 127–28, 857 P.2d 1053 (1993).

No case from this Court has ever adopted this sole-cause standard. Rather, this Court, when applying the ABC Rule, has employed the normal proximate-causation standard. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123, 330 P.3d 190 (2014) ("such act or omission exposes or involves B . . . in litigation with C" (citation and internal quotation marks omitted)); *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 196, 390 P.2d 976 (1964) (damages available where litigation was "the natural and proximate consequence[] of a wrongful act" (citation omitted)). This case provides an opportunity to correct the Court of Appeals' neglect of these decisions. RAP 13.4(b)(1).

Moreover, the sole-cause standard is one more way the ABC Rule departs radically from the rest of Washington law. In the rest of

Washington tort law, cause-in-fact can be proved even where the defendant's negligence is just *one* cause of the plaintiff's injury, since there may be more than one proximate cause of an injury. *See, e.g.*, *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 676–77, 709 P.2d 774 (1985); 6 *Washington Practice: Washington Pattern Jury Instructions: Civil* 15.01 (6th ed. 2012); *see also Schmidt v. Coogan*, 181 Wn.2d 661, 670, 335 P.3d 424 (2014) (noting that the measure of damages in a legal malpractice action is the loss sustained as a proximate result of the attorney's wrongdoing). There is no reason that the normal standard should not apply here.

The Court of Appeals' sole-cause standard also conflicts with RCW 4.22.070. That statute directs the jury to apportion liability among *all* at-fault actors. *See* RCW 4.22.070(1) ("[T]he trier of fact shall determine the percentage of total fault which is attributable to *every* entity which caused the claimant's damages . . . ." (emphasis added)). However, a sole-cause rule for attorneys exonerates an at-fault attorney merely because another cause may also have contributed to a loss.

As applied by the Court of Appeals, the ABC Rule protects negligent lawyers from liability even in situations where their negligence did damage the client. Washington courts have never examined why the risk of loss in such cases should be borne by the client—who may even be

innocent—rather than the negligent lawyer. This case provides an excellent opportunity for this Court to examine this issue of substantial public interest. RAP 13.4(b)(4).

CONCLUSION

The ABC Rule clashes with basic principles of Washington law. It conflicts with mitigation-of-damages principles, and, as applied by the Court of Appeals, it also conflicts with normal proximate-cause principles. For these reasons, in addition to those already discussed by Petitioner, this Court should grant the Petition for Review to reconsider the ABC Rule's application to legal malpractice.

RESPECTFULLY SUBMITTED this March 15, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on March 16, 2017, I caused a true and correct copy of the foregoing MEMORANDUM OF AMICI CURIAE BRIAN J. WAID AND ROBERT J. WAYNE IN SUPPORT OF PETITION FOR REVIEW to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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